ABDUL RAHIM

v.

ABDUL HAMEED & ANOR.

HIGH COURT MALAYA, JOHOR BAHRU
MOHD. YUSOFF MOHAMED J
[ORIGINATING SUMMONS NO. 101/1981]
11 SEPTEMBER 1982

SUCCESSION: *Will - Application by executors and trustees to declare invalid a provision of the will - Deceased a Muslim - Validity of will- Deceased by his will devised and bequeathed whole of his properties - Whether infringes Muslim law - More than one-third - Delay in vesting - Whether offending the rule against perpetuity - Probate granted by Singapore Court - Resealing at High Court Johore Bahru - Whether Malaysian Court has jurisdiction to construe and decide the validity of the will.*

This was an application by one of the Executors and Trustees of a Muslim deceased's estate to declare invalid a provision of his will dated 10 July 1939 and a codicil dated 18 June 1947 annexed in reference to disposition of his properties. The remaining two executors, Abdul Hameed and Abdul Majeed gave written consent to this application and renounced their rights and titles to this probate. The probate was granted by the High Court, Singapore in August 1951 and was resealed in the Supreme Court (High Court), Johore Bahru on 30 September 1953.

The deceased by his will devised and bequeathed the whole of his properties consisting of various pieces of land in Malaya and two businesses in Johore. The applicant contends that the provisions in Clause 7 of the will and Clause 3 of the codicil (see full Judgment) infringes the Muslim law in purporting to dispose of more than 1/3 of the deceased's estate; in delaying the vesting of his estate; and also offending the rule against perpetuity.

Held:

[1] Upon resealing of the probate, s. 52 of the Probate and Administration Act, Act 97, provides that it has like cause and effect and has the same operation in Malaysia as if it were a grant made by the High Court in Malaysia. It follows that the local Court has jurisdiction to construe and decide the validity of the will as if it was admitted to probate in Malaysia.

[2] The deceased, being a Muslim, his testamentary capacity in Malaysia to devise immovable property is governed and regulated by Muslim law. The Wills Ordinance 1959 does not apply to persons professing the Muslim religion - s. 2(iii) of the Ordinance.

[3] In Muslim law, a testator has power to dispose of not more than one-third estate and the residue descends in fixed proportions unless the heirs consented. Clause 7 of the will clearly shows that the deceased attempted to dispose of all his properties by his will. This contravenes his power of disposal exceeding the legal one-third of his properties. It cannot therefore be valid.

[4] Under the Muslim law, a testator cannot delay the vesting of his estates, in his heirs and that part of Clause 7 which directs the vesting of his estates in his heirs be deferred to 21 years after the demise of his last surviving children was also invalid.

[5] As regards the disposition in Clause 7 allegedly offending the perpetuity rule, the principle of devising a property against the rule of perpetuity was not applicable in relation to disposition of property by Muslims in the State of Johore.

[6] In this event, Clause 7 of the will cannot be valid as infringing the provisions of Muslim law.

[Application allowed.]

Cases referred to:
Shaik Abdul Latif v. Shaik Elias Bus [1915] 1 FMSLR 204
Saeda v. Hj. Abdul Rahman [1918] 1 FMSLR 352
Koh Cheng Seah v. Syed Hassan bin Ahmad Al-Attas & Anor. [1930] 1 MC 180

Legislation referred to:
Probate and Administration Act 1959 (Act 97), s. 52
Wills Ordinance 1959, s. 2(iii)

Other sources referred to:
Dicey's Conflict of Laws, 8th Edn., p. 521
Halsbury's Laws of England, 3rd Edn., Vol. 39, para. 1281

JUDGMENT

Mohd. Yusoff Mohamed J:

This is an application to declare invalid a provision of a will of a deceased Muslim, Rahiman Sahib s/o Cosainsa Rowther dated 10 July 1939 and a codicil dated 18 June 1947 annexed, relating to disposition of his properties.

The applicant is one of the executors and trustees of the deceased's estate. The remaining two executors, Abdul Hameed and Abdul Majeed have consented to this application in writing and have renounced their rights and titles to this probate. The probate was granted by Singapore High Court in August 1951 and has been resealed in the Supreme Court (High Court) at Johore Bahru on 30 September 1953.

The deceased was a Muslim of Sunnite Sect belonging to the School of Hanafi. His will devised and bequeathed the whole of his properties consisting of various pieces of land in Malaya and two businesses, one at Johore Bahru and another at Kota Tinggi, Johore. Clause 7 of the will provides that:

> I declare and direct that twenty-one (21) years after the death of the last survivor of my children my Trustees are to wind up my said business and to sell call in and convert into cash every other property real and personal estate of whatsoever nature and wheresoever situate and to divide the proceeds of such sale calling in and conversion into nine (9) shares and to appropriate such shares as follows:

and Clause 3 of the codicil states:

> ... For the reason stated in Clause 2 *Supra* I hereby substitute "Seven (7) shares" in the place of "nine (9) shares" appearing in the eighth line of Clause 7 (seven of my said will; and revoke and delete the whole of sub-clause 7(i) of my said Will).

The applicant contends that this provision of the will and codicil infringes the Muslim law in purporting to dispose of more than one-third of the deceased's estate; in delaying the vesting of his estate; and also offending the rule against perpetuity.

Upon resealing of the probate, s. 52 of the Probate and Administration Act, Act 97, provides that it has like cause and effect and has the same operation in Malaysia as if it were a grant made by the High Court in Malaysia. It follows that the local Court has jurisdiction to construe and decide the validity of the will as if it was admitted to probate in Malaysia.

Now, in respect of the disposal of various lands, the deceased's capacity to devise immovable property is governed by *lex situs* (see Dicey's *Conflict of Laws*, 8th Edn. on p. 521). This means, the Malaysian domestic law. Being a Muslim, the deceased's testamentary capacity in Malaysia is regulated by Muslim law. The Wills Ordinance 1959 does not apply to persons professing the Muslim religion - s. 2 (iii) of the Ordinance.

As regards to movable property in respect of the deceased's two businesses, the validity of the will of movables depends in general upon the law of the deceased's domicile at the date of his death, (see Halsbury's *Laws of England*, 3rd Edn., Vol. 39 para. 1281). This means that the law governing the disposition of the two businesses is the Singapore Law.

A foreign law when administered by the Courts in Malaysia may be proved as a fact by the parties. From a Singapore case (unreported) produced to me at trial by applicant's Counsel, originating summons No. 313 of 1982, Mr. Justice T.S. Sinnathuray similarly as in Malaysia, rejected a deed of settlement of properties by a person professing a Muslim religion which is inconsistent with Muslim law by reason of infringement of the provisions of the law. In that event, it would appear that Muslim Law in fact, also governs the disposition of the deceased's two businesses in Singapore.

In Muslim Law, a testator has power to dispose of not more than one-third of his estate and the residue descends in fixed proportions unless the heirs consented. [See *Shaik Abdul Latif v. Shaik Elias Bus* [1915] 1 FMSLR 204].

Clause 7 of the will directs that:

> ... my Trustees are to wind up my said business and to sell call in and convert into cash every other property real and personal estate of whatsoever nature and wheresoever situate and to divide the proceeds of such sale calling in and conversion into nine (9) shares ...

This provision clearly shows that the deceased attempted to dispose of all his properties by his will. This contravenes his power of disposal exceeding the legal one-third of his properties. It cannot therefore be valid.

Clause 7 of the Will also directs that:

> ... twenty-one (21) years after the death of the last survivor of my children my Trustees are to wind up my said business and to sell ...

By this clause, the deceased seemed to direct the vesting of his estates in his heirs be deferred to 21 years after the demise of his last surviving children. Again under the Muslim Law, a testator cannot delay the vesting of his estates, in his heirs, In *Saeda v. Hj. Adbul Rahman* [1918] 1 FMSLR 352 it was held that a direction in the Will of a Muslim instructing the executors to deal with his estate for 10 years and then distribute it is invalid. On this ground, this part of the Clause 7 also becomes invalid.

As regards the disposition in Clause 7 allegedly offending the perpetuity rule, I would simply say that the principle of devising a property against the rule of perpetuity is not applicable in relation to disposition of property by Muslims in the State of Johore. See *Koh Cheng Seah v.Syed Hassan bin Ahmad Al-Attas & Anor*. [1930] 1 MC 180.

In this event, Clause 7 of the Will cannot be valid as infringing the provisions of Muslim Law and I would give judgment in terms of this application.

Also found at [1983] 1 CLJ 133